IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO. 95,752
	)	
RONALD R. RIFE,	)	DCA CASE NO. 98-38
	)	
Respondent/Appellee.	)	
______________________________	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERIT BRIEF OF RESPONDENT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0473944
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904-252-3367
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	
THIS COURT SHOULD ANSWER THE CERTIFIED QUESTIONS AFFIRMATIVELY, ALLOWING DOWNWARD DEPARTURE TO BE BASED ON VICTIM CONSENT IN CASES OF SEXUAL BATTERY AND SEXUAL BATTERY BY A PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY.	3
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Baker v. State 723 So. 2d. 338 (Fla. 5th. DCA 1998)	5
Jones v, State 640 So. 2d. 1084 (Fla. 1994)	3
Jory v. State 668 So. 2d. 195 (Fla. 1996)	5

OTHER AUTHORITIES CITED:

Section 921.0016(2), Florida Statutes	5
Section 921.0016(4)(f), Florida Statutes	4

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Petitioners statement of the case and facts.

SUMMARY OF THE ARGUMENT

The lower court gave valid, legal reasons for imposing a downward departure in this case. The State's argument that judicial discretion should be removed and lower courts be prevented from departing for victim consent in cases like this is wrong. In any event the lower court had other valid reasons for departure aside from consent. The Fifth District Court of Appeal must be affirmed.

ARGUMENT

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTIONS AFFIRMATIVELY, ALLOWING DOWNWARD DEPARTURE TO BE BASED ON VICTIM CONSENT IN CASES OF SEXUAL BATTERY AND SEXUAL BATTERY BY A PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY.

Petitioner, the State of Florida, spends a great deal of time and space arguing that the legislature has a strong interest in preventing the sexual exploitation of minors. Respondent has no particular argument with this position. Respondent will argue that the State's interest is not hampered by allowing sentencing guideline departures to sometimes be based on the victim's consent.

The State's position seems to be that if circuit judges are allowed to depart downward in these cases based on victim's consent, the judges will do it all of the time and will always be wrong. Trial judges, who observe the witnesses and listen to the evidence in these cases, should not be given sentencing discretion says the State. The State is wrong.

The State quotes Justice Kogan's opinion in Jones v. State, 640 So. 2d. 1084 (Fla. 1994). Justice Kogan was not writing about sentencing but about whether

consent is a defense to sexual battery. Of course consent is not a defense. The Fifth District's opinion in this case does not change that fact.

The Petitioner writes that because of the legislature's interest in protecting children, the legislature must not have intended Florida Statutes, Section 921.0016(4)(f), to apply to sex crimes with child victims. This statute section allows downward departures when the victim initiates or is a willing participant in the crime. The State does not base its conclusion on anything, it just makes the statement. The Petitioner further warns that the "potentially infinite downward departure" will result in defendants not being punished for this crime. Undersigned counsel is not an expert, but this is the only case undersigned counsel has personally worked on involving a downward departure based in part on consent. Undersigned counsel is aware of four or five reported cases involving such a departure.

The State argues that sentencing hearings in child sexual battery cases will become mini-trials at which the victim is traumatized while the defense tries to establish that the victim was a participant. That is not what happened here. The trial testimony established that the victim was a willing participant in the crime. It seems logical that the victim's participation would be established at trial. Defense counsels are not going to help their clients by questioning blameless child victims about whose idea the sexual activity was.

Petitioner next moves on to the argument that when a defendant is convicted of sexual activity with a minor the defendant has familial or custodial authority over, no departure should be allowed based on victim consent. The petitioner once again writes of the State's duty to protect children. The State next raises another problem, determining whether a child victim was a "willing participant".

There is already an abundance of law which holds that reasons for departure must be supported by the record, Jory v. State, 668 So. 2d. 195 (Fla. 1996), Baker v. State, 723 So. 2d. 338 (Fla. 5th. DCA 1998), Florida Statutes, Section 921.0016(2). If the prosecutor believes the sentencing court was incorrect, and the victim was not a willing participant, this is grounds for an appeal. Trial judges are not stupid people. They will usually be able to tell if the victim was a willing participant in the crime to the extent that a departure is called for. Such a decision is subject to review. The State's arguments do not justify removing the circuit judge's discretion.

Finally, the State argues that the trial court abused its discretion by using consent as one of the reasons for departure in this case. The State seems to rely on the fact that the unfortunate victim in this case was sexually abused for years by her father. This does not erase the victim's actions. The victim voluntarily agreed to have sex with Respondent in this case. When the victim moved in with the respondent there

was no sexual condition added to victims staying with Respondent. Victim was never told "Have sex with me or leave." The trial judge correctly determined that the victim willingly had sex with Respondent. This particular reason for departure is well supported by the record.

Finally, the other reasons for departure are valid and supported. When the lower court found this to be an isolated incident it wasn't a finding that there was only one sexual battery. The court meant that Respondent was not a habitual sex criminal who had victimized any other child. This is true. The forty-nine year old Respondent's criminal record consisted of two misdemeanors, D.U.I. and reckless driving. The State argues that this crime was part of a sophisticated plan on the part of Respondent. This is ridiculous. The seventeen year old victim appeared at Respondent's door, looking for a place to stay. Respondent allowed her to move in and resumed the sexual relationship which was already in progress. Respondent admitted his wrongdoings to the police when questioned.

Respondent has shown remorse in this case. The State argues that he has not because he blamed some things on the victim. While the State will doubtless argue the point, there is evidence that the victim was a morally guilty party here. The State often brings up testimony by a social worker that the victim had an emotional age well below her chronological age. There was no evidence that the victim was

intellectually challenged. She came across as being a fairly intelligent girl.

Respondent asks this Court to affirm both the lower court and the Fifth District Court of Appeal, and answer the certified questions with a yes. It must be kept in mind that there were numerous good reasons for the departure in this case. If this Court reverses the Fifth, the Circuit Court must be given the opportunity to impose at least as large a departure on resentencing.

CONCLUSION

BASED UPON the argument and authorities contained herein, Respondent respectfully requests that this Honorable Court affirm both the lower court and the Fifth District Court of Appeal, and answer the certified questions with a yes.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

____
KENNETH WITTS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0473944
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR RESPONDENT

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and mailed to Ronald R. Rife, Inmate No. E-04729, Avon Park Correctional Institution/Work Camp, Post Office Box 1100, Avon Park, Florida 33826-1100, on this 12th day of August, 1999.

____
KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	S.CT. CASE NO. 95,752
	)	
RONALD R. RIFE,	)	DCA CASE NO. 98-38
	)	
Respondent/Appellee.	)	
______________________________	)	

A P P E N D I X